85-2157

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE ALUMINUM ASSOCIATION, INC.,
and
NATIONAL ASSOCIATION OF
RECYCLING INDUSTRIES, INC.,
Petitioners,

v.

NORFOLK & WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 204 of the Staggers Rail Act of 1980 (49 U.S.C. § 10731(e)) required the railroads (appellants below) to "reduce and thereafter maintain" rates on non-ferrous recyclable commodities at or below maximum levels to be determined by the Interstate Commerce Commission in accordance with the statute, and delegated to the Commission full authority to issue all orders necessary to implement this provision. The questions presented are:

1. Does Section 204 prohibit the Commission from ordering reductions in rail rates on individual movements of non-ferrous recyclable commodities so that all such such rates would be at or below the maximum levels prescribed by the Commission?

2. Does the time limitation for review under the Hobbs Act (28 U.S.C. §§ 2342, 2344) prohibit the railroads from challenging a ruling contained in an order of the Interstate Commerce Commission issued two years prior to filing the petition for review?

PARTIES TO THE PROCEEDING

Petitioners in The Court of Appeals

Atchison, Topeka & Santa Fe Railway Company
Baltimore and Ohio Chicago Terminal Railroad Company
Baltimore & Ohio Railroad Company
Boston & Maine Railroad
Burlington Northern Railroad Company
Chesapeake and Ohio Railway Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Chicago and North Western Transportation Company
Chicago, Rock Island & Pacific Railroad Company
Cincinnati, New Orleans & Texas Pacific Railway Company
Delaware and Hudson Railway Company
Denver and Rio Grande Western Railroad Company, The
Elgin, Joliet and Eastern Railway Company
Grand Trunk Western Railroad Company
Green Bay and Western Railroad Company
Illinois Central Gulf Railroad Company
Kansas City Southern Railway Company
Louisiana & Arkansas Railway Company
Louisville & Nashville Railroad Company
Missouri-Kansas-Texas Railroad Company
Norfolk & Western Railway Company
Oklahoma, Kansas and Texas Railroad Company
Pittsburgh & Lake Erie Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis Southwestern Railway Company
San Diego and Arizona Eastern Transportation Company

Santa Maria Valley Railroad Company
Seaboard System Railroad, Inc.
Soo Line Railroad Company
Southern Railway Company
Southern Pacific Transportation Company
Terminal Railroad Association of St. Louis
Texas Mexican Railway Company, The
Ventura County Railway Company
Vermont Railway, Inc., The
Winston-Salem Southbound Railway Company

Intervenors in Support of Petitioners in The Court of Appeals

Consolidated Rail Corporation

Respondents in The Court of Appeals

Interstate Commerce Commission
United States of America

Intervenors in Support of Respondents in The Court of Appeals

The Aluminum Association, Inc.*
Fort Howard Paper Company

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*Member companies include: Alcan Aluminum Corporation, Alflex Corporation, Algonquin Industries, Inc., Aluminum Castings & Engineering Co., Aluminum Company of America, Aluminum Mills Inc., Alumax Inc., American Aluminum Casting Company, Anchor-Harvey Components Inc., ARCO Metals Company, Atomized Metal Powders Inc., Barmet Industries Inc., Bodine Aluminum Inc., Botsford Chemical Company, Clendenin Brothers Inc., Cliff Impact Division (Division of Parker-Hannifin), Concise Casting Corporation, Consolidated Aluminum Corporation, Copperweld Corporation (Wire and Cable Division), Cressona Aluminum Company,

National Association of Recycling Industries, Inc.**
Reynolds Metal Company

Durable Wire, Inc., Eastern Casting Corporation, Eck Industries Inc., Ekco Products Inc., Elkem Metals Company, Ethyl Corporation, Extruded Metals (An Indian Head Company), Foote Mineral Company, Fort Wayne Foundry Corp., General Extrusions Inc., Golden Recycle Company, Hall Foundries & Manufacturing, Inc., Harris Metals Inc., Hitchcock Co., Jarl Extrusions Inc., Kagan-Dixon Wire Corporation (Sub. of Southwire Company), Kaiser Aluminum & Chemical Corporation, KBI Division, Cabot Corporation, Luxfer U.S.A. Limited, Magnode Corporation, Mansfield Brass & Aluminum Corporation, Martin Marietta Aluminum Inc., Metal Impact Corporation, Milward Alloys Inc., Minalex Corporation, Morel Foundry Corporation, National Aluminum Corporation (Sub. of National Steel Corporation), National Northeast Corporation, New Jersey Aluminum Company, Nichols-Homeshield Inc., Noranda Aluminum Inc., Norandex Inc., Norsk Hydro Aluminum Inc., Permold Corp., Pimalco, Precision Extrusions Inc., Progress Foundries, (Div. of Acrometal Companies Inc.), Quality Aluminum Casting Co., Reliable Castings Corporation, Reynolds Metals Company, RJR Archer Inc., Ross Aluminum Foundries, S-G Metals Industries Inc., Shaped Wire, Inc., Southwire Company, Stahl Specialty Company, Sunset Foundry Company Inc., Tower Extrusions Inc., Transmet Corporation, United Aluminum Corporation, United States Bronze Powders Inc., U.S. Reduction Company, Valimet Inc., V.A.W. of America Inc., Vulcan Materials Company, Warner Manufacturing Corporation, Weber Metals Inc., Wellman Dynamics Corporation, R.D. Werner Company Inc., Willard Bronze Co. Inc.

**A trade association for the recycling industry with no Rule 28.1 affiliates.

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OPINIONS BELOW

The two basic opinions of the Interstate Commerce Commission involved here are set forth in the appendix at pages 25a and 96a. The opinion of the Court of Appeals (Judge Starr dissenting) is reported at 768 F.2d 373 (D.C. Cir. 1985), hereinafter referred to as NARI VI, and is set forth at App. 1a. The Court's orders denying rehearing, suggestion of rehearing *en banc* and the petition for clarification are unreported and are set forth in the appendix at pages 110a, 111a and 113a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1985. App. 1a. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 4 1986 (App. 110a, 111a) and this petition was filed within ninety days of that date. Jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTES INVOLVED

Section 204 of the Staggers Rail Act of 1980, 49 U.S.C. § 10731(e), provides as follows:

> (e) Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase.

> The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection.

The Hobbs Act (28 U.S.C. §§ 2342 and 2344) provides in pertinent part as follows:

> 28 U.S.C. § 2342. Jurisdiction of the court of appeals.
>
> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of — . . .
>
> (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.
>
> Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.
>
> 28 U.S.C. § 2344. Review of orders; time; notice, contents of petition; service.
>
> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of —
>
> (1) the nature of the proceedings as to which review is sought;
>
> (2) the facts on which venue is based;
>
> (3) the grounds on which relief is sought; and
>
> (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

STATEMENT OF THE CASE

Section 204 of the Staggers Rail Act of 1980, 49 U.S.C. § 10731(e), was the last of three statutes designed to require railroads to reduce rates on recyclable commodities.[1] Those attempts by Congress to rationalize rail freight rates for the recyclable industry spawned six trips to the United States Court of Appeals for the District of Columbia Circuit.[2] The first five decisions of the Court of Appeals consistently supported the Congressional purpose of reducing the rate structure on recyclable commodities, ruling that it was incumbent on the Commission to reduce all rates on non-ferrous recyclable commodities, whatever the nature.

NARI VI, the decision involved in this Petition, represents a radical and unwarranted departure from the prior

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[1]P.L. No. 93-236, 87 Stat. 985 (1973), 49 U.S.C. § 10710; P.L. No. 94-210, 90 Stat. 31 (1976), 49 U.S.C. § 10731(a)-(d); P.L. No. 96-448, 94 Stat. 1895 (1980), 49 U.S.C. § 10731(e).

[2]*National Assn'n of Recycling Industries v. ICC*,585 F.2d 522 (D.C. Cir. 1978) (hereinafter *NARI I*); *National Ass'n of Recycling Industries v. ICC*, 627 F.2d 1328 (D.C. Cir. 1980), *mod. sub nom. Consolidated Rail Corp. v. National Ass'n of Recycling Industries*, 449 U.S. 609 (1981) (hereinafter *NARI II*); *National Ass'n of Recycling Industries v. ICC*, 660 F.2d 795 (D.C. Cir. 1981) (hereinafter *NARI III*); Baltimore & Ohio R. Co. v. ICC, No. 82-1066, slip. op. (D.C. Cir. June 9,1982, printed in Appendix at ____a) (hereinafter *NARI IV*); *National Ass'n of Recycling Industries v. ICC*, 704 F.2d 638 (D.C. Cir. 1983) (hereinafter *NARI V); Norfolk & Western R. Co. v. ICC*, 768 F.2d 373 (D.C. Cir. 1985) (hereinafter *NARI VI*).

decisions of the District of Columbia Circuit and a new and unsupportable construction of Section 204 of the Staggers Rail Act of 1980. That the suggestion for rehearing *en banc* was denied by a seven to four vote is clear evidence of a sharp division within the Circuit Court and further suggests the need for review by this Court.

The appeal arose in a bizarre manner. The sequence of events is of critical importance in understanding the issues involved. The chronology is as follows:

1. Section 204 of the Staggers Rail Act of 1980, effective October 1, 1980, directed all rail carriers to reduce rates to levels prescribed by the Interstate Commerce Commission by January 1, 1981.

2. On December 30,1980, the Interstate Commerce Commission prescribed a maximum rate level equal to 146% of variable cost. Ex Parte 394, *Cost Ratio for Recyclables - 1980 Determination,* 364 ICC 425, 426 (1980). The Commission, however, refused to require the railroads to reduce recyclable rates to that level.

3. On appeal, the District of Columbia Circuit held that Section 204 of the Staggers Rail Act required immediate reductions on non-ferrous recyclable rates exceeding 146% of cost (*NARI III,* 660 F.2d at 802).

4. On remand, the Interstate Commerce Commission issued its order in Ex Parte 394 of October 13, 1981 (App. 96a), which required the railroads to (a) reduce their rates to 146% of cost; (b) pay shippers refunds of excess charges collected since January 1, 1981; (c) implement the reduction in rates by utilizing average territorial revenue-to-cost data developed by the railroads in a prior general revenue proceeding; and (d) authorize complaints by individual shippers whose rates still exceeded the maximum level af-

ter the territorial rate reductions. This is one of the two Commission orders involved herein.

5. The railroads immediately appealed from that part of the Commission's order which awarded refunds. On June 9, 1982, the D.C. Circuit, in an unpublished opinion, affirmed the Commission's authority to issue refunds. *NARI IV*, App. 107a.

Subsequent to the Court's decision in *NARI IV*, The Aluminum Association filed a complaint on behalf of its shipper members in accordance with the Commission's order of October 13, 1981. Numerous other shippers, including members of the National Association of Recycling Industries, Inc. ("NARI"), also filed specific rate complaints and most of the proceedings have been processed through the initial decision stage.

6. Two major railroads, Consolidated Rail Corporation ("Conrail") and the Chessie System ("Chessie"), implemented the Commission's order by publishing cost sensitive proportional rate scales applicable on their lines at levels no higher than 146% of cost. The rate action taken by Conrail and Chessie was approved by the Commission. This resulted in cancellation of joint rates by other carriers and the application of combination rates which were, in many cases, higher than the joint rates which the Commission had ordered reduced. On appeal, the D.C. Circuit ordered the Commission to determine proper rates for all carriers which would bring all rates to a level below the 146% benchmark. *NARI V*, 704 F.2d at 640.

7. On December 6, 1982, the Commission served a further decision to evaluate compliance with its orders for reduced rates. In that decision, the Commission noted that individual shippers may file formal complaints concerning movements which they contend are above 146% of cost after the territorial reductions took place. App. 90a.

8. On May 20, 1983, the Commission entered yet another order in Ex Parte 394 and again ruled that the scope of its order issued in 1981 applied to all rates on all non-ferrous recyclables. App. 64a.

9. The railroads then filed a Petition for Clarification or Declaratory Order asking the Commission to rule that individual complaints by shippers with rates above 146% would be prohibited since the railroads had implemented the territorial reductions ordered by the Commission. On July 20, 1983, the Commission reiterated its initial ruling issued October 13, 1981 that the maximum rate level applied to all individual rates and that shippers whose rates were still above 146% of cost could file complaints with the Commission and request refunds. App. 44a - 45a.

Respondent railroads petitioned for review of the July 20, 1983 order of the Commission which resulted in the Court of Appeals' opinion in *NARI VI,* which held that Section 204 did not contemplate reductions in all rail recyclable rates – only average rates. App. 17a. The Court therefore held that the complaints pending before the Commission were invalid. It cannot be emphasized too strongly that the Commission order appealed from, the July 20, 1983 order, was in fact only a reaffirmation of the Commission's procedure set forth in its order of October 13, 1981. Thus *NARI VI* struck down an order which had already been affirmed once on appeal on one issue and which had been effective without challenge as to the rest of the issues for nearly two years.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Frustrates the Purpose of Section 204

It is clear that Congress considered that a rationalization of the rail rate structure on non-ferrous recyclable commodities was essential to stimulate the efficient and economical utilization of solid waste in the United States. Three legislative attempts and six decisions of the Court of Appeals are ample testimony that this is an issue to which Congress attached considerable significance and that there has been a long history of legal efforts on the part of the railroad industry to frustrate the implementation of the statutory purpose.

The language of Section 204 is relatively simple. Its purpose is plainly stated in uncomplicated terms. The railroads were required to reduce rates to levels prescribed by the Commission. The Commission's order was thus a maximum rate order. Under any conceivable context, the act of charging rates above a level determined by the Commission to be a maximum reasonable level is unlawful.[3] Thus, common sense and plain English logically lead to the conclusion that Congress intended that all rail rates on non-ferrous recyclable commodities be maintained at levels below the maximum.

The Court of Appeals in its majority opinion, however, ruled that Section 204 did not mean what it said. Under the Court's interpretation, the first sentence of the statute only required the railroads to reduce average rates to the level prescribed by the Interstate Commerce Commission.

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[3] *A.J. Phillips Company v. Grand Trunk Western Railway Co.*, 236 U.S. 662 (1915); *Farmers Union Supply Company v. A.T. & S.F. Ry. Co.*, 219 ICC 486, 489-90 (1937); *ICC. v. Atlantic C.L.R. Co.*, 334 F.2d 46, 50 (5th Cir. 1964).

The second sentence, according to the Court's interpretation, means that individual rates cannot be increased so long as they remain above the maximum level prescribed by the Commission. The term "rates" thus has a different meaning in the two sentences under the lower Court's reasoning. In the first sentence "rates" means average rates while in the second sentence "such rates" means individual rates.

The statute, of course, does not make any such distinction. The majority reasoned, however, that such an interpretation was necessary in order to reconcile the second sentence of the statute which contemplated that some rates would remain above the mandated maximum.

The apparent ambiguity found by the Court of Appeals arising out of the language in the second sentence is vastly overstated. The second sentence prohibiting increases must be interpreted in the context of the rapidly escalating rate structure which saw ten generally applicable rate increases incorporated into the rate structure on recyclables before the mandated reduction could be implemented.[4] Congress simply tried to forestall the application of a series of increases added onto the rate structure before the required reductions could take place.

In *NARI III,* the Court ruled the Commission must immediately reduce rates on recyclable commodities. *NARI III,* 660 F.2d at 802. In the course of its opinion, the Court referred to statements by sponsors of the Staggers Act. *Id.* at 800-801. Excerpts from such statements were printed in the Commission's original cost ratio determination, *Cost*

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[4]The increases implemented by the railroads in 1980 and 1981 and applied to recyclable commodities were X-375(A), X-311(B), X-375(C), X-386, X-311(C), X-311(D), X-311(E), X-001, X-002, X-003.

Ratio for Recyclables - 1980 Determination, 364 ICC 425 (1980). It is significant that the excerpt from Senator Long's statement addressed the meaning of the second sentence. Senator Long stated:

> The language – "as long as any such rate equals or exceeds such revenue-to-variable cost ratio cap established by the Commission, such rate shall not be required to bear any further increase" – was included in Section 204 of the 1980 Act to prevent any rate increases on recyclables during periods which intervene each year between the Commission's annual establishment of "cap" and actions taken by the railroads actually "to reduce" rates to the new annual "cap" level in situations where the "cap" may be reduced. 364 ICC at 427-28.

Senator Long's comment fully explains the second sentence and deflates the convoluted hypotheses on which the "ambiguity" found by the majority were based.

In essence, the majority of the Court of Appeals has ruled that the Commission is precluded by Section 204 from ordering the railroads to reduce all rates to the maximum level contemplated by Congress. There is nothing in the legislative history which supports such a radical conclusion. There is nothing in the statutory language which remotely suggests that Congress intended that the railroads be permitted to select which rates should be maintained above the statutory maximum and those which would be correspondingly maintained below the maximum level. Had the Commission simply ordered the railroads to reduce all rates to the maximum level without the intermediate territorial reduction, it seems hardly likely that any court would have held such action contrary to the statute. Yet this is the inescapable result of the Court's inter-

pretation of the statute and its action in barring shippers from seeking relief for their individual rates which are above the cap.

In concluding that Section 204 of the Staggers Act only required the railroads to reduce average rates to the maximum levels set by the Commission, the Court of Appeals was obviously influenced by its aversion to the two-stage implementation procedure. Throughout its opinion, the Court erroneously termed the procedure as novel, a break with the Commission's past practices, and unfair.

In making these observations, the Court apparently ignored another important aspect of Section 204. The last sentence of the statute expressly delegates to the Commission authority to "issue all orders necessary to enforce the requirements of this subsection." 49 U.S.C. § 10731(e). Nowhere in the Court's opinion is any consideration given to this broad grant of discretionary authority. A two-stage implementation of rate increases has been practiced by the Commission for many years. Territorial increases in general revenue cases have traditionally been followed by individual rate initiatives by carriers and complaints by shippers to rectify inequities caused by the territorial adjustment.[5] The Commission explained in its July 20, 1983 order that this kind of procedure is precisely what it had envisioned from the beginning. App. 44a - 45a.

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[5]All general increases approved by the Commission to improve carrier revenue were conditioned on the ability of shippers to contest the application of such increases to their individual rates in subsequent complaint proceedings. *See, e.g., Increased Freight Rates and Charges, 1972,* 341 ICC 290, 331-332 (1972); *Increased Freight Rates and Charges, 1975,* 349 ICC 555, 583 (1975). The Court of Appeals for the District of Columbia recognized this procedure and commented on it in *NARI I* (585 F.2d at 525-526), and the Supreme Court dealt with the long standing two stage procedure of territorial rate in-

As Judge Starr pointed out in his dissent (App. 19a), review of agency actions in cases such as this should be limited to determine whether the action is reasonable. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2783 (1984). The Court of Appeals may not substitute its judgment for that of the agency). This principle is particularly applicable here where there is an express grant of broad discretionary power to the Commission.

The plain fact is that there are literally thousands of movements of recyclable aluminum products still moving at rates far above the Commission's mandated maximum rate ceiling. After over twelve years of legislative and legal battles, these shippers are back on square one. They cannot file complaints to reduce their rates to the maximum level prescribed by the Commission,[6] and they cannot recover excess charges which the railroads have been collecting for the past five and one-half years. In the meantime, the railroads are free to increase recyclable rates under the procedures authorized by the Staggers Act and substantial increases have been applied on all recyclable rates, both below and above the maximum rate ceilings.

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creases followed by specific rate complaints at length in *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 310-16; 95 S. Ct. 2336, 2351-2353 (1975).

[6]The railroads argued strenuously in the Court below that shippers can file complaints under Section 11701 of the Interstate Commerce Act. 49 U.S.C. § 11701. Such complaints, however, would be subject to the market dominance provisions of Section 10709, which now prohibit complaints unless the rates exceed 180% of variable cost. Thus, there is no way disadvantaged shippers can now ever achieve the Congressional objective of reasonable rate levels for recyclables which the Commission has set at ratios varying between 143% and 155%.

2. The Petition for Review Should Have Been Dismissed Under the Time Limitation of the Hobbs Act

The Interstate Commerce Commission, The Aluminum Association, and the National Association of Recycling Industries all contended that the petition for review in *NARI VI* was barred by the sixty-day limitation of the Hobbs Act. 28 U.S.C. § 2344. In *NARI VI,* the complaint procedure authorized by the Commission in its October 13, 1981 order was struck down even though the petition for review of that issue was not filed until 1983. Moreover, the 1981 order had already been reviewed on a different issue and affirmed by the Court of Appeals in 1982. *NARI IV.* The majority of the court held that the sixty-day limitation of the Hobbs Act was not applicable thereby creating a new exception to the sixty-day time limit which has heretofore been consistently and strictly enforced by the Supreme Court and the Courts of Appeals.

Judicial review of orders of the Interstate Commerce Commission came under the provisions of the Hobbs Act in 1975. The purpose of the 1975 amendment was to simplify the review process and to impose a time limit of sixty days within which to appeal ICC decisions. The importance of the sixty-day limitation has been emphasized many times. *Natural Resources Defense Council v. Nuclear Regulatory Commission,* 666 F.2d 595 (D.C. Cir. 1981); *Chem-Haulers, Inc. v. United States,* 536 F.2d 610, 613-14 (5th Cir. 1976). Efforts to enlarge the time by procedural ploys, such as filing a petition for reconsideration or modification after expiration of the time limits have ail been firmly rejected as a means of extending the sixty-day period. *National Bank of Davis v. Office of Comptroller of Currency,* 725 F.2d 1390 (D.C. Cir., 1984). A similar tactic was employed here where the railroads filed a Peti-

tion for Clarification or Declaratory Order requesting the Commission to abandon its two-stage implementation procedure and prohibit the filing of individual complaints over a year and a half after the sixty-day review period for the October 13, 1981 order expired.

Until *NARI VI,* Courts of Appeals have emphasized strict adherence to the sixty-day time limit as necessary to achieve administrative finality in order to implement agency policy efficiently. The action of the majority of the Court of Appeals in *NARI VI,* permitting an issue to be raised in appellate review some two years after final agency action, makes it virtually impossible for persons affected by an agency decision to rely on it unless all aspects of the decision have been expressly reviewed and affirmed.

The majority held that the validity of the two-stage procedure authorized by the Commission was not ripe for review in 1981. The Court's reasoning is as follows:

> As of October 1981, no complaints had been filed by shippers seeking individual rate reductions, no orders had been entered requiring the making of such reductions, and there was no indication whether the Commission would order such reductions if they were requested. Accordingly, it seems quite likely that in 1981 a petition to review a single unclear sentence would have been dismissed as unripe. App. 10a - 11a.

The ruling of the Court of Appeals leaves shippers in a quandary. Clearly, no one could have filed any complaint until after the Commission's order was issued in 1981 after remand from *NARI III.* After all, the previous Commission order had said that the railroads were *not* required to reduce their rates. Since no complaints were on file, it is obvious no orders could have been issued, and since the railroads appealed the October 13, 1981 order, it is quite

obvious that no complaints were going to be filed until after disposition of that appeal. After the Commission's order was affirmed, numerous complaints were filed. Some of the cases have been concluded by the Commission and most of the others have progressed beyond the initial decision stage. As of October, 1981, however, it was clearly impossible to meet the majority's standard of ripeness for review under the Hobbs Act.

Apparently, it is the lower court's position that the railroads must be allowed judicial review of the issue of the two-stage implementation of the mandated rate reductions at any time. The railroads' petition for review was not filed until late in 1983, long after complaints had been filed and Commission orders in many cases had been issued. The Court, however, made no suggestion that the railroads had any duty to bring the issue up when it became clear, under the Court's theory, that such complaints were being considered by the Commission. The railroads appear to enjoy the enviable position of being able to force shippers to go through the expensive, time-consuming litigation authorized by the Interstate Commerce Commission and, if the results were unfavorable to the railroads, simply file a Petition for "clarification" or for "declaratory order," thus bringing the 1981 issue back to life and subject to review. This concept is startling and has implications far beyond the boundaries of this case. It seriously weakens the doctrine of administrative finality which the time limitation of the Hobbs Act was designed to promote.

The Court of Appeals also attempted to justify its decision on the basis that the 1981 decision was unclear regarding the nature of the two-stage proceeding and based on a single cryptic sentence. The passage in the 1981 order referred to by the majority court's opinion is as follows:

> As a practical matter, it would not be feasible to require the carriers to develop ratios for every individual movement. We also realize that tariff changes will be more numerous and complex if the Schedule C traffic segments are used. However, to come as close as possible to applying the average figure to individual rates, we will require reductions based on the Schedule C traffic segments. This method will best serve the purposes Congress intends to achieve with Section 204.
>
> Furthermore, should a shipper of nonferrous recyclables believe that his particular rate still exceeds the permissible level, he may file a complaint with the Commission. App. 101a.

Indeed, this section of the Commission's order, when read in context with the rest of the order, leaves little doubt that the Commission was contemplating territorial reductions followed by specific adjustments made by shipper complaints. As noted by the dissenting judge, the Comission's explanation may not have been a model of clarity, but it is hard to read the passage quoted above as having any meaning other than that individual shipper complaints would be permitted subsequent to implementation of the territorial average reductions. App. 23a.

Moreover, in all of the Commission orders issued subsequent to October 13, 1981 the Commission has reiterated the importance of the complaint procedure to overall compliance with the mandate of Section 204 of the Staggers Act. It was referred to in the Commission's order of December 6, 1982 (App. 90a) and reaffirmed in its order of July 20, 1983 in response to the Petition for Declaratory Order filed by the railroads. There can be no doubt that from the beginning everyone was fully aware of the existence of the complaint remedy. The Court's decision

holding that the issue of individual complaints was not ripe for review constitutes a hole in the sixty-day review limitation of the Hobbs Act big enough to permit a steady stream of challenges to agency action filed years after issuance of a final agency order.

If the railroads were confused by the Commission's authorization, or thought it exceeded the statutory authority granted by the statue, the obvious remedy was to file a petition for reconsideration or a petition for review within the time limits required for such pleadings. It is wholly improper to permit the railroads to wait two years and then raise the issue after the recycling industry had conscientiously followed the procedures which had been authorized by the Commission and which had been in existence without challenge for nearly two years. Accordingly, the railroads' petition for review should have been barred by the time limitation of the Hobbs Act.

CONCLUSION

This Court should grant a writ of *certiorari* to the United States Court of Appeals for the District of Columbia for the reasons set forth hereinabove.

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